C23

FILED
AUG 30 1945

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 345

PAUL WILSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
for the Sixth Circuit
and
BRIEF IN SUPPORT THEREOF

JOHN Y. BROWN,
Lexington, Kentucky,
HOBART F. ATKINS,
Knoxville, Tennessee,
CLEON K. CALVERT,
Pineville, Kentucky,
Attorneys for Petitioner.

CLAUDE P. STEPHENS,
United States Attorney,
Lexington, Kentucky,
Attorney for Respondent.

LAWYER PUBLISHING CO., BROOKLYN, N.Y.

INDEX

	PAGES
PETITION FOR WRIT OF CERTIORARI	1-8
I. Summary statement of matter involved	1-3
II. Jurisdiction	4
III. Specification of Errors	4-6
IV. Reasons relied on for the allowance of the writ	6-8
BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI	9-25
Opinions of Court Below	9
Jurisdictional Grounds	9
Statement of Case	9
Specification of Errors	10
Summary of Argument	10-11
Argument	11-23
A. A consideration of all of the evidence compels the conclusion that petitioner had applied for a license to operate Sharp's Tourist Court which license had not been granted and he was not in control of the business; that he didn't personally commit the offense, if an offense was committed at Wallsend Tourist Place, and that it was entirely insufficient to support a judgment and conviction in a criminal case according to the well-defined rules of criminal law	11-13
B. By taking judicial knowledge of the Federal Register, the Honorable Court should have supported the petitioner's position that Regulation 445 as it existed at the time of this supposed offense did not fix and establish a ceiling price or a price that petitioner was allowed to pay for the whiskey involved, and thus he suffered an injustice which constitutes a reversible error for which the cause should be remanded to the District Court for a trial de novo	14-16

PAGES

C. Regulation 445 dealing with intoxicating liquors violates the 21st Amendment to the Constitution and that the Federal Government may not rely upon either the due process clause, commerce clause or the equal protection clause of the Constitution to act in the liquor field 16-22

D. Your petitioner was convicted on counts 1 and 6 for the sale of two cases of Rocking Chair whiskey and one case of Spring Hill whiskey when, in fact, said whiskey was sold to Robert Carter Barrett by one Luther Floyd. The said Floyd was indicted for the sale of said whiskey and on the indictment pleaded guilty and has since served a sentence for said offense. That to convict this petitioner on a charge to which another has pleaded guilty and served time is an inexcusable injustice which is contrary to every concept of right, and that the United States Attorney has recognized that this petitioner has been done an injustice 23

CONCLUSION 24-25

APPENDIX 26-44

Federal Register 26-34

O. P. A. Regulations 34-44

CITATIONS

Burger v. Salmon, 24 L. Ed. 1104 7

Calder v. Bull, 1 L. Ed. 648 7

Carter v. Virginia, 321 U. S. 131 6-19

Cisson v. U. S., 37 F. (2) 330 7

Corneli v. Moore, 267 Fed. 456 21

PAGES

Faris, J. in Fallstaff Corp. v. Allen, 278 F. 643 22

53 Stat. 391 12

Finch and Company v. McKittrick, 305 U. S. 395 6

Hamilton v. Kentucky Distillery Co., 251 U. S. 146, 40 S. Ct. 106 19

Hazel Drug Co. v. Wilmer, 131 Penn. 286 22

Hebert v. Louisiana, 71 L. Ed. 22

Indianapolis Brewing Company v. Liquor Commission, 305 U. S. 191 6

Jatros v. Bowles, C. C. A. 6, 143 F. (2) 453 4

Kentucky Statutes, sections 241.010 to 244.099 16-17

Mahone v. Triner Corp., 304 U. S. 401 6

Section 347, Title 328 United States Code (Acts of March 3, 1891, chapter 517. Section 6, 26 Stat. 828; March 3, 1911, ch. 231, sec. 240, 36 Stat. 1157; February 13, 1925, ch. 229, sec. 1, 43 Stat. 928; January 31, 1928, ch. 14, sec. 1, 45 Stat. 54; June 7, 1934, ch. 426, 48 Stat. 926) 4

S. C. on appeal, 253 U. S. 350, 40 S. Ct. Rept. 486 21

Thompson v. Utah, 42 L. Ed. 1061 7

Title 44, section 305, Federal Code Annotated 26-34

U. S. v. Eight Packages & Cask of Drugs, 5 F. (2) 971 .. 7

U. S. v. Feigelstock (CCNY) Federal case 150, 84, 14 Blatchf, 321 12

U. S. v. Jackson (CCBA) Federal case 154, 55, 1 Hughes, 531 12

U. S. v. Lanza, 260 U. S. 377, 43 S. Ct. 141 17

U. S. v. Renken, 55 Fed. Supp. 1 4

Yakus v. U. S., 321 U. S. 414, 64 S. Ct. 660, 88 L. Ed. 653 4

Ziffren, Inc. v. Reeves, 308 U. S. 132 6

Ziffrin v. Reeves, 308 U. S. 132, 60 S. Ct. 163, 84 L. Ed. 129 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

PAUL WILSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals for the Sixth Circuit

---

To the Honorable Harlan Fiske Stone, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Paul Wilson, in support of his petition for a writ of certiorari to review the final judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered on the 23rd day of July, 1945, affirming his conviction of May 16, 1944, respectfully shows:

I

SUMMARY STATEMENT OF THE MATTERS INVOLVED

Paul Wilson was indicted under six counts in the District Court for the Eastern District of Kentucky. Record, page 11. He was tried before the Court and found guilty on counts 1, 3, 4 and 6, and not guilty on counts 2 and 5.

Counts 1 and 6 of the indictment charge a violation of the revenue statute in that, "on or about the 14th day of

February, 1944, and between said date and the 22nd day of February, 1944, * * * one Paul Wilson, being then and there a wholesale liquor dealer, that is engaged in the sale and disposition of distilled spirits in quantities of more than five wine gallons to the same person at the same time, said place of business being located at Sharp's Tourist Court, Middlesboro, Kentucky, did unlawfully, wilfully and feloniously fail to pay the special tax required to be paid by wholesale liquor dealers under the provisions of Section 3250 of the Internal Revenue Code."

And Count 6 sets out that the said Paul Wilson at said place of business at Sharp's Tourist Court, Middlesboro, Kentucky, did unlawfully sell and deliver to Robert Carter Barrett a quantity of distilled spirits, to-wit: two cases of "Rocking Chair" whiskey for the sum of $144.00, and one case of "Spring Hill" whiskey for the sum of $75.00, or a total of $219.00, which price was in excess of the maximum price fixed and permitted by law, namely $108.00, said sale being in violation of the Emergency Price Control Act of 1942, and Regulation No. 445. Record, page 15.

The 3rd and 4th Counts charge a violation of the Regulation of the Office of Price Administration, in that said Paul Wilson at his place of business at Sharp's Tourist Court, Middlesboro, Kentucky, did unlawfully sell and deliver to Robert Carter Barrett a quantity of distilled spirits, to-wit: one case of "Paul Jones" whiskey for the sum of $90.00, which price was in excess of the maximum price fixed and permitted by law, namely $45.90, which sale was in violation of the provisions of the Emergency Price Control Act of 1942, and Regulation 445 hereinabove referred to.

Count No. 4 sets out that "the said Paul Wilson, at his place of business at 'Paul's Place,' Wallsend, Bell County, Kentucky, did unlawfully sell and deliver to Robert Carter Barrett a quantity of distilled spirits, to-wit: one case of 'Paul Jones' whiskey for the sum of $90.00, which price was in excess of the maximum price fixed and permitted by law, namely, $45.90, which sale was in violation of the Emergency Price Control Act of 1942 and Regulation No. 445 hereinbefore referred to.

Your petitioner, Paul Wilson, denied all of the averments in the indictment, but the Court in an oral opinion, Record, page 169, found the petitioner guilty on counts 1, 3, 4 and 6, and on the 29th day of May, 1944, sentenced the petitioner on Count No. 1 to two years imprisonment and a fine of $2,000.00, and on Count No. 6 to one year imprisonment, but the sentences on both of these counts were probated. On Count No. 3, petitioner was sentenced to one year imprisonment and fined $5,000.00 and on Count No. 4 petitioner was sentenced to one year imprisonment and fined $5,000.00, and it was ordered that these sentences should be served consecutively.

Your petitioner appealed from the decision of the District Court to the United States Circuit Court of Appeals for the Sixth Circuit, and on June 11, 1945 the Circuit Court of Appeals rendered an opinion affirming the judgment of the District Court and on the same day judgment was rendered in accordance therewith. Record, page 181.

Petition for rehearing was duly filed in the United States Circuit Court of Appeals on the 27th day of June, 1945, Record, page 189, and on July 23, 1945, said petition for rehearing was denied and the final judgment entered therein. Record, page 209.

II

JURISDICTION

(1) The date of the judgment or decree to be reviewed is July 23, 1945, and this petition is filed within the time provided by law.

(2) The statutory provision which is believed to sustain the jurisdiction of this Court is Section 347 of Title 328 of the United States Code, (Acts of March 3, 1891, Chapter 517. Section 6, 26 Stat. 828; March 3, 1911, ch. 231, sec. 240, 36 Stat. 1157; February 13, 1925, ch. 229, sec. 1, 43 Stat. 938; January 31, 1928, ch. 14, sec. 1, 45 Stat. 54; June 7, 1934, ch. 426, 48 Stat. 926).

(3) Section 204 (d) 50 U. S. C. A. provides that jurisdiction to determine the validity of the Regulation Number 445 of the Emergency Price Control Act of 1942, here involved, is an exclusive jurisdiction of the Emergency Court of Appeals or the Supreme Court and it further provides that no Court, federal, state, or territorial shall have jurisdiction to consider the validity of any such regulation.

The constitutionality of Regulation number 445 is still an open question. See *Jatros* v. *Bowles,* C. C. A. 6, decided June 6, 1944, 143 Federal Second, 453; *U. S.* v. *Renken,* 55 Fed. Supp. 1; *Yakus* v. *U. S.,* 321 U. S. 414; 64 S. Ct., 660, 88 L. Ed. 653.

III

SPECIFICATION OF ERRORS

(1) The United States Circuit Court of Appeals for the Sixth Circuit erred in holding that the petitioner was a wholesale liquor dealer within the meaning of the Act.

(2) The United States Circuit Court of Appeals erred in affirming the judgment of the District Court that the

petitioner was guilty of violating Regulation 445 of the Office of Price Administration. The Circuit Court of Appeals failed to take judicial notice of the Regulations, which prior to the purported commission of the acts complained of, were printed and published in the Federal Register and all Courts were charged with judicial knowledge thereof, and the said Court failed to note that the indictment in this case was drawn and the proof offered on Office of Price Administration Regulations which were first published on May 2, 1944 and made effective May 8, 1944, and that the offense with which petitioner is charged was committed in the month of February, 1944, and therefore, petitioner was, in effect, tried on an ex post facto regulation of the Office of Price Administration, which is a denial of the Constitutional rights of this petitioner and is contrary to the decisions of this Court as hereinafter set out.

(3) The United States Circuit Court of Appeals for the Sixth Circuit erred in holding that the record sustained the opinion of the District Court in adjudging the petitioner guilty and sentencing him under Counts 1, 3, 4 and 6.

(4) The Court erred in failing to reverse Counts 1 and 6 in that the record shows that the petitioner was convicted under Counts 1 and 6 for the alleged sale of two cases of "Rocking Chair" whiskey and one case of "Spring Hill" whiskey to Robert C. Barrett when, in fact, said whiskey was sold by one Luther Edwin Floyd, Record, page 28, and that said Luther Edwin Floyd was indicted for the sale of the self same whiskey on May 8, 1944 and on said indictment pleaded guilty and served a sentence in the Federal penitentiary, that said fact was set out in a supple-

mental motion and grounds for a new trial filed May 22, 1944. Record, page 26.

That a great injustice has been done this petitioner, and that Honorable Claude P. Stephens, United States Attorney for the Eastern District of Kentucky, realized that an injustice was being done this petitioner, as shown by the affidavit of said Claude P. Stephens, Record page 179.

IV

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

A. The constitutionality of Maximum Price Regulation 445 dealing with intoxicating liquors in States that have, by appropriate legislation, availed themselves of the provisions of section 2 of the 21st Amendment is of such importance to a large number of the States that this Honorable Court should declare and define the rights of the citizens of the various States thereunder.

B. The 21st Amendment to the Constitution of the United States returned the regulation of liquor to the various States.

C. Regulation 445 of the Office of Price Administration, dealing with intoxicating liquors, violates the 21st Amendment to the Constitution of the United States. See *Carter* v. *Virginia*, 321 U. S. 131; *Indianapolis Brewing Company* v. *Liquor Commission*, 305 U. S. 191; *Finch and Company* v. *McKittrick*, 305 U. S. 395; *Mahone* v. *Triner Corp*, 304 U. S., 401; *Ziffren, Inc.* v. *Reeves*, 308 U. S. 132.

D. The District Court adjudged the petitioner was guilty of engaging in the wholesale whiskey business under proof of a single transaction which involved more than five wine gallons, which judgment should have been reversed by the Circuit Court of Appeals.

(2) The Circuit Court of Appeals erred in failing to reverse the District Court on the judgment on Counts 3 and 4, which charged a violation of Maximum Price Regulation 445, which indictments were drawn under Amendment 15 to MPR 445, which amendment was not adopted until May 8, 1944, whereas the offense for which petitioner was convicted was committed in February, 1944. In effect, your petitioner was indicted and tried under a Regulation which was not in effect at the time of the commission of the offense. This Regulation is fully discussed in the brief attached hereto, but the failure of the Circuit Court of Appeals and of the District Court to consider your petitioner's assignment of this error is a denial of the constitutional rights of this petitioner and is the equivalent of trying this petitioner upon an ex post facto regulation, which decision is in conflict with the applicable decisions of this Court on the question of ex post facto laws. See *Calder* v. *Bull*, 1 Law Ed. 648; *Burger* v. *Salmon*, 24 Law Ed., 1104; *Thompson* v. *Utah*, 42 Law Ed. 1061; *Cisson* v. *U. S.*, 37 F. (2) 330; *U. S.* v. *Eight Packages & Cask of Drugs*, 5 F. (2) 971.

(3) Your petitioner was convicted on Counts 1 and 6 for the sale of two cases of "Rocking Chair" whiskey and one case of "Spring Hill" whiskey when, in fact, said whiskey was sold to Robert Carter Barrett by one Luther Floyd. The said Floyd was indicted for the sale of said whiskey and on the indictment pleaded guilty and has since served a sentence for said offense. That to convict this petitioner on a charge to which another has pleaded guilty and served time is an inexcusable injustice which is contrary to every concept of right, and that the United States Attorney, as aforesaid, recognizes that this petitioner has been done an injustice and that by his affidavit,

Record, page 179, the said United States Attorney was willing to reduce the sentence in this case, but this petitioner was not willing to agree to a sentence of twelve months in jail and $3000.00 fine which the United States Attorney states in his affidavit he was willing to recommend to the Court, but this petitioner, relying on his own innocence, refused this modified sentence.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals for the Sixth Circuit had in the case numbered and entitled on its docket, No. 9815, Paul Wilson, Appellant, v. United States of America, Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States, and that the judgment herein of said Circuit Court of Appeals be reversed by this Court; and your petitioner further prays that the certified copy of the record and the proceedings of said United States Circuit Court of Appeals filed with this petition may be treated as a return to said writ of certiorari, and your petitioner prays that he may have such other and further remedies in the premises as to the Court may seem appropriate and in conformity with law.

Dated August 18, 1945.

PAUL WILSON, *Petitioner,*

By JOHN Y. BROWN,
Counsel for Petitioner.

Of Counsel:
HOBART F. ATKINS,
CLEON K. CALVERT.